United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

WILL ARGUE IF GRANTED PERMISSION BY THE COURT.

76-1140

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IN THE
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

UNITED STATES OF AMERICA

vs.

DAVID N. BUBAR,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT.

RUDOLPH LION ZALOWITZ, ESQ.
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HACKENSACK, N.J.

PAGINATION AS IN ORIGINAL COPY

APPENDIX

EXHIBIT

Article from Hartford Courant of Wednesday, January 14, 1976

STATEMENT OF THE CASE.

This was a prosecution brought against Rev. David N. Bubar, and 9 other defendants, in which they were charged with Kidnapping, Arson, Conspiracy, etc., in a 4 count reduced indictment #75-59. ([redacted])

After a Trial that lasted approximately 20 weeks in the U.S. District Court, New Haven, Conn. before Judge Jon O. Newman, and a jury. Deft. Rev. Bubar was found guilty of 4 counts, as was Dennis Tiche, and Peter Betres, co-defts. After the denial of separate motions for Severance, Change of Venue, based upon Pretrial Publicity, Mistrial, and Motion for a New Trial, David Bubar, received 20 years sentence, Dennis Tiche, received 15 years.., and Peter Betres received sentence of 15 years, From the judgment and commitment, David Bubar timely appealed to this court.

FACTS:

Rev. Bubar is an ordained Minister of the First Century Christian Church, Memphis, Tenn. He was the spiritual advisor of Charles D. Moeller, one of the other defts., who was acquitted by the jury. Rev. Bubar refused to break his vow of religious, spiritual, ministerial privilege, and did not take the stand to testify. Because of this position, the strategy of other counsel was to place the entire blame and burden of the alleged offense solely upon him. Although present counsel demanded, by motion of severance, etc., a change of venue because pretrial publicity was extremely heavy, and because there was unbelievable massive media prejudice exuding from the TV, radio, and press, the trial court denied the motions made.

ARGUMENTS FOR APPEAL

ARGUMENT ONE.

PREJUDICIAL PROSECUTORIAL MISCONDUCT.

U.S. Attorney Dorsey, violated the fundamental right of Rev. Bubar by his specific comment on p.10866 Vol Lxiv: (January 13, 1976) lines 15 thru 22: "Now, Mr. Zalowitz, said to you at the conclusion of his argument (Summation) that somebody has made a sucker, and he spelled it, of Mr. Bubar; and I submit to you, ladies and gentlemen, it isn't the question of what his status was, but what did he do? What did he know? What did he participate in? How did he interrelate with the others? And, from that evidence, I submit to you that there has been no refutation of the thrust of the government's case insofar as the defendant Bubar is concerned."

This is a direct violation of the 5th Amendment of the U.S. Constitution:

"It is improper for a Prosecutor to argue re: Defendant's silence, and failure to take the stand to refute." Davis v. U.S. 357 FR 2nd 438, 18 UDC 3481.

"Deft. has an absolute right to remain silent, and no prosecutor or Judge has a right to comment upon such failure" Clarke vs.. Nelson 441 FR 2nd 790 CA 9 Cal. 1969 See: Griffin v. California 380 U.S. 609 at 614 (1965):; See Sandoval v. U.S. CA 1 Puerto Rico 1909, 409 F2nd 529 "COMMENT ON FAILURE OF ACCUSED TO TESTIFY, EVEN BY IMPLICATION, is improper. See U.D. v. Flannery 451 F. 2nd 880 1st circuit. (1971)

"The deft. Bubar has the right to sit back and that is the whole point to the 5th amendment."

Same volume as above: page 10909: Judge Newman "IF THIS WERE A ONE DAY TRIAL, I MIGHT, BUT IT'S NOT A ONE DAY TRIAL, SO THE MOTIONS (of present counsel and others for a declaration of a Mistrial, after 20 weeks of trial) are denied." THIS PARAGRAPH WAS THE COMMENT OF JUDGE NEWMAN. This is almost incomprehensible. What matters is that prejudice was shown, by the U.S. Attorney, and the Learned Court did not disavow the said prejudice of the U.S. Attorney. The Court's act was highly prejudicial to Bubar, and a Mistrial should have immediately been granted.

See: WILSON V. U.S. 149 U.S. 60 at 66:

"The U.S. Supreme Court suggested that there may be many reasons why a deft. might not wish to take the witness stand. "The statute in tenderness to the weakness of those who from the causes mentioned... declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him."

It is, of course, the duty of the prosecutor to advance the government's cause with vigor,; but he must observe the principles essential to the affair, a just proceeding".. while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States 295 U.S. 78 at 88 (1935). Clearly the prosecutor here overstepped the bounds of propriety."

It is a prejudical act of the prosecutor as a Matter of Law. It is impossible to say beyond a reasonable doubt (that the deft's failure to take the stand and refute) that it did not affect the jury.

DEFT. BUBAR HAS AN ABSOLUTE RIGHT TO REMAIN SILENT AND NOT HAVE THE U.S. ATTORNEY MAKE ANY COMMENT THERETO. Attached hereto report of the Hartford Court, Wed. Jan 14, 1976 page 39, self-explanatory.)

Exhibit "A"

page 10901. Line 10 and continuing"

Mr. Zalowitz: I'm saying that it was gross misconduct on the part of Mr. Dorsey....."

I am asking for a mistrial at this state because of the conduct of the U.S. Attorney."

page 10902.

line 6 and continuing "I want this Court to instruct them that all comments--all comments--that were made by Mr.. Dorsey with respect to the failure of Rev.. Bubar to reply, ...is not commendable, but condemnable.....

the Failure (line 15) of U.S. attorney to do anything but brainwash this jury into that which he has no right to say in this courtroom, and that is, that he has no right to allude to the failure of Rev. Bubar in any wise to refute or take any stand to deny,."

page 10906

line 7 commencing: ..."I am asking for a mistrial, and/or in the alternative for a judgment of acquittal for Rev. Bubar because of the action by the U.S. Attorney.."

page 10907 commencing line 25: the Court: "....to whatever extent the

argument of government counsel called upon any defendant to testify or to explain away any evidence, to whatever extent that may have occured, such argument was improper, uncalled for and illegal. HOWEVER NOTE THE NEXT STATEMENT BY THE COURT: (line 5 thru 7) "Now, the argument may not have been intended to be taken that way, at all, and I have instructed you not to take it that way." This apparently is a complete neutralization of the action of the Prosecutor in the eyes of the Jury, to the total prejudice to Rev. Bubar". This does not cure the error.

ARGUMENT TWO

THE COURT DID PREJUDICIALLY SENTENCE DAVID BUBAR to an Excessive Sentence of twenty years, for the violation of Counts 1,2,3, and 4 of the indictment. Note that he sentenced Peter Betres and Dennis Tiche, two of the other defendants who were also convicted of the same counts, 1,2,3, and 4 to terms of only 15 years. The past record of Rev., Bubar has been impeccable. There was no need for such severity toward Bubar, by Judge Newman. Counsel maintains there should be equality of sentence terms herein without exception. See Vol Lxxix March 24, 1976, pages 58,59,60. For analysis, of the disparity of the sentencing by Judge Newman.

On page 58 LINES 10 thru 19:

"With respect to defendant, Bubar, on Count 1, he is committed to the custody of the Attorney General for 5 years; on Count 2 he is committed to the Attorney General for 5 years, that sentence to run consecutively to the sentence on Count one. On Counts three and four, on each count he is sentenced to the custody of the Attorney General for 10

years, those sentences to run concurrently with each other, but consecutively to both the sentences on Counts one and two, for an aggregate sentence of 20 years. Lines 19 and following: 'With respect to defendant Dennis Tiche, he is committed to the Custody of the Attorney General on Count one for 5 years; with respect to Count 2, he is committed to the custody of Attorney General for 5 years, that sentence to run consecutively to the sentence on Count One. With respect to Counts three and four, on each of those counts, he is committed to the Custody of the Attorney General for 10 years, the sentence on each of those Counts three and four to run concurrently with each other, but consecutively to the sentence on Count One, for an aggregate sentence of 15 years.

Read pages 59 and 60, the apparent confusion and prejudice to Rev. Bubar become very clear and apparent wherein he is sentenced to 20 years, and both Betres and Tiche are sentenced only to 15 years each, by Judge Newman for the same crime, same counts 1 thru 4, inclusive and same conviction. This is unbelieavable and should be rectified. The sentence for defendant Bubar is excessive when seen in the same context with the sentences imposed upon Betres and Tiche. See page 60 Sentences cannot run both consecutively and CON-currently at the same time. The prejudice and confusion created by Judge Newman, becomes apparent when you read page 58,59, and 60. This should be rectified on the basis of equality to encompass David Bubar as well as Dennis Tiche, and Peter Betres, sentences. The sentencing power should be equated under the Equal Protection of the Law concept of the 14th amendment of the Constitution.

ARGUMENT THREE

Bail pending appeal should not be denied to Rev. Bubar.

VOL. LXXIX : Please read pages 65 thru 68 regarding the "Desealing of the Ruling regarding the setting and denying the bail to Rev. Bubar pending his appeal, under section 3148, instead of section 1346. The Trial Court refers to "MENTAL ABERRATION" of Bubar. The assumption by the Court of the right to determine the mental capacity of any individual, including Bubar, is a definite, and prejudicial assumption of powers which have never been given to the Courts by any Statute. This is entirely a medical decision and not a judicial one. The fact that a man has a vision is not indicative of mental aberrations per se. Visions have been accepted by good authority over the past centuries, viz: The Catholic Church, and its religious dogmas. The Old Testament speaks constantly of visions and prophecies. This action by Judge Newman is a highly prejudicial expression of Personal Bias to Rev. Bubar. and cannot be allowed to overcome proper judicial action. Demand has been made by Counsel for Deft. Bubar to Release the Judges opinion referring to Section 3148, for purposes of appeal. Counsel maintains that section 3146 is the proper section to determine the bail for Bubar.

ARGUMENT FOUR

THE TRIAL COURT, WITH IMPROPRIETY INSTEAD OF MARSHALLING THE EVIDENCE IN HIS CHARGE TO THE JURY, COMMITTED BIAS AND PREJUDICE TOWARD REV. BUBAR BY COMMENTING UPON THE EVIDENCE.

See page 10936 (Vol. # LXV) The Court erred prejudically in his charge to the Jury. The Court summed up the Government's case to the Jury, instead of Marshalling the evidence for analysis. The Court endeavored to

cure the error by using the phrase, From line 20," Now as to some of the defendants, there is evidence whi , if you accept it, indicates....." Proper marshalling of the evidence by the Court should have been:

line 21.."Now as to some of the defendants, is there evidence which, if you except it, indicates....."

The entire tenor of the Marshalling of the evidence as against Bubar reading the charge of Judge Newman from pages 10986 thru line 25, to and including page 10990

Continuing of the Court's charge to the Jury pages 11017 l 23:

Mr. Z: "My final statement, your honor, is this. When the Court did marshall the evidence, specifically with reference to Rev. Bubar, the Court sopke of a statement among two other statements that Reverend Bubar gave to Agent Slifka. The Court did not put forth the date of that statement which was March the 3rd, barely a day and a half after the alleged offense.

The Court did not state the circumstances under which that statement was adduced notwithstanding by being there. Continuing line 8 "the Court did not say, which I feel the Court should act with -- should have with caution stated, that it was done under compulsion and not voluntarily, notwithstanding that I was there, for this reason: That Agent Slifka let it be known to Reverend Bubar, "If you are not there and there punctionally, we will have the dragnet out and have you arrested immediately."

line 14 "That doesn't spell a voluntary, sir, statement. I am saying further that in view of the fact that the Court did exclude, even at

insistence that it be included, even at my projection of asking two witnesses of the government, Special Agent McNamara, which he said there was no meeting on March 7th between the FBI, myself, and the Connecticut State Police, and there was no testimony or no statement made, that was a "lie".

Number two, when the statement came forth and I endeavored to introduce a tape recording of the statement that took place on March 7th, finally Mr. Dorsey had to come forth, sir, -- THE COURT: Please, We have been all over your claims about March 7th.

page 11019, line 2 "MR. ZALOWITZ: It has not been spoken to this Jury. It was outside the province of the jury:. The jury should be made known that fact with regard to the voluntariness of the statement of Rev. Bubar, otherwise, your Honor, you are not marshalling the evidence, you are commenting upon it. (THE UNDERLINING IS MADE BY RLZ.)

The Court: All right.

Line 9: "AS FAR AS THE LAST point, Mr. Zalowitz, in the discussion of the law on accepting or rejecting confessions you will note that I specifically mentioned the March 2d date, so there can be no ambiguity in their minds -- Mr. Z: It was March 7th, sir.

The Court: I wasn't talking about the March 7th interview. I was talking about the earlier one, which is the only one in evidence in this case.

Mr. Z: I am saying it should be--

The Court: I understand what you are saying. You have made your point..."

page 11020 line 2 "I am saying that I am satisfied that there has been

adequate instruction on the standards to apply in judging the voluntariness of confessions without detailing them further."

Mr. Z: .."I object."

The Court's comments hereinabove were highly prejudicial to the Deft. Bubar.

ARGUMENT FIVE

REVEREND BUBAR, COULD NOT RECEIVE A FAIR, AND IMPARTIAL TRIAL IN THE VERY TENSE CLIMATE OF U.S. DISTRICT COURT, NEW HAVEN, CONNECTICUT.

From the very moment of the alleged Fire, all of Media, Radio, TV and Press were abounding with complete Saturation regarding the Shelton Alleged Arson Case, and they made a carnival atmosphere regarding Rev. David Bubar, Alleged Psychic. The Saturation point was even greater than that of Dr. Shepard, and Patty Hearst. Notwithstanding all of this horrendous publicity, the Trial Judge, denied all motions for Severance of the Defendants, and a Charge of Venue. This was an Arbitrary and Capricious Abuse of Discretion by the Trial Court. A reversal of the Judgment of Conviction of David Bubar should be granted and a New Trial should be granted.

SEE DOCUMENT NUMBERS 102, and 103 regarding change of Venue, and Pre-Trial Publicity, are to be made Exhibits herein, as if herein annexed.

ARGUMENT SIX

REV. BUBAR SHOULD HAVE THE RIGHT TO HAVE A JURY OF HIS PEERS TO TRY HIM.

Document #145, Challenge to the array of the Jury by Rev.

Bubar should have been granted by the Trial Judge. Failure to grant the motion is reversible error. No clergyman was allowed to sit on Bubar's Jury, thus violating his constitutional rights to have a jury of his Peers. Failure to have a jury of his peers denied him of a fair and impartial jury to try his matter.

New Haven County has a 35% black population. Only 7 blacks were listed among the many prospective jurors, Notwithstanding, the national average of blacks serving on Juries is 23.5%. Only one black person was selected on this jury, and served as an alternate juror. This failure and instance amounts to Civil Rights Discrimination in Reverse.

ARGUMENT SEVEN

Pre-trial Publicity was extremely pervasive and Inflammatory making it impossible to impanel an unbiased jury, unless there was a change of Venue, and a Sequestration of the Jurors.

The right to be tried by a jury uninfected by extraneous influence is rooted in the Sixth Amendment guarantee of the Right to a Trial by an impartial jury, U.S. Constitution VI and the Fourteenth Amendment, Due Process guarantee of a Fair Trial, which includes the requirement that the decision of the Trier of Fact be rendered impartially.

SHEPPARD V..MAXWELL 384 U.S. 333 (1966.)

The appellate court is under a duty to make an independent evaluation of the facts and circumstances. If the appellate court finds "a likelihood that the verdict was tainted by a prejudice born

of pre-trial publicity..." the defendant (Bubar) is entitled to a reversal of his conviction. The "facts and other circumstances" (((Approximately 1000 workers were put out of work in Shelton, and surrounding towns) in an area of approximately 20000. population))) to be considered on appellate review include, inter alia, the nature and magnitude of the publicity. SHEPPARD V. MAXWELL, supra, at 356.

The United States Supreme Court has looked beyond the juror voir dire, and reversed a conviction on a finding that the adverse and inflammatory publicity had an inherent prejudicial impact on the jurors. IRVIN V. DOWD, 366 U.S. 171 (1961), the Court found that when intense community hostility toward the defendant is manifest in the record of the juror voir dire, a "finding of impartiality does not meet constitutional standards." Id. at 728. The Court found "the build-up of prejudice clear and convincing. As in the Bubar Case...the Media Radio, Press and TV absolutely saturated the community to the absolute prejudice of Defendant "Bubar" because of its inflammatory nature. The present case vs. Bubar should be reversed, or a New Trial Granted to an area far removed, by a change of venue. The same, applies because of the inflammatory publicity and prejudice generated during the trial since the protective features available are fewer once juror exposure is established. The jury was not Sequestered...leaving them free to hear and see all comments made by the media throughout the entire trial daily, all to the prejudice of Bubar, and for this reason the case must be reversed or a New Trial granted by the Appellate.

The HARTFORD Courant. Wed. JAN. 14 76
p. 29. Rev. David N. BUBAR

Mistrial Bid Denied in Bomb Case

By LAWRENCE B. RASIE

NEW HAVEN — Nine angry defense lawyers asked for acquittals or mistrials Tuesday in the Sponge Rubber Co. firebombing case after U.S. Atty. Peter C. Dorsye Dorsey addressed the jury in a manner termed by the trial judge as "improper, uncalled for and illegal."

Judge Jon O. Newman denied all the motions on grounds that Dorsey's remarks did not jeopardize defendants' chances of getting a fair trial in the case that goes to the jury today. But Newman did tell the jury that certain Dorsey remarks were "improper, uncalled for and illegal." A Sponge Rubber Products Co. plant in Shelton was blown up in a firebombing March 1.

The defense lawyers were unanimous in their objections after Dorsey had finished his rebuttal summation to the jury. Traditionally, in both evidence hearings and case summations, the prosecutor goes first and then after defendants have presented their cases, the prosecutor is allowed to give a rebuttal.

Defense lawyers Tuesday all charged Dorsey said all nine defendants failed to disprove charges of prosecutors.

That is a direct violation of "an absolute Constitutional right of defendants not to testify or offer any evidence at all if they choose," said Newman. It means the government must prove its charges beyond a reasonable doubt and not vice versa.

Newman said to the jury "I feel (those remarks by Dorsey) were not intended" to violate defendants' rights. He told the jury to disregard Dorsey's remarks about defendants' "failure to prove."

In his rebuttal, Dorsey also said the American judicial system gives defendants several devices that "equalize" the power of the government.

About Sponge Rubber President Charles D. Moeller, a defendant, Dorsey said that although Moeller's personal net worth dropped $2.5 million because of the Shelton fire, Moeller still stands to gain millions from insurance on the plant. The insurance coverage, however, was on the basis of an oral agreement with a local insurance agent and the national insurance carrier thus far has refused to recognize the oral agreement as valid.

Dorsey also tried to shore up star witness John W. Shaw, whom all defendants had attacked as either "getting a deal for his testimony" or being a "pathological liar." Much of the government's case depends on the jury's opinion about Shaw's credibility.

Earlier Tuesday, Atty. Alan Neigher of Stamford summarized the case of Ronald D. Betres of Butler, Pa. Neigher said an alleged fingerprint of Betres is really not his. He showed the jury differences between this print, turned up by the FBI in its investigation, and a formal print of Betres taken at an FBI office. Neigher also said the government has shown absolutely no motive for Betres, a factory foreman, to have taken part in the arson.

Atty. Thomas Clifford of Hartford summarized the case for Michael J. Tiche of Boyers, Pa. Clifford cited a clear "lack of evidence" to show Tiche was in the Shelton factory March 1. Clifford also cited differences in identification of Tiche made by a gate guard at Shelton.

Clifford also charged an alleged fingerprint of Tiche's, reportedly found in the car of a codefendant, was really not found in that car, but somewhere else, a place unnamed by the government.